U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 10, 2016

BY ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

The Government writes in opposition to the letter motion from defendant Gary Hirst ("Br."), dated September 9, 2016, in which he seeks authorization to elicit information during trial about the period of time in which Galanis's phone was monitored, the number of calls that were recorded during the period of monitoring and the number of those calls that were with Hirst. (Br. 1). Hirst should be precluded from offering such evidence for at least three reasons: (1) Hirst could not independently introduce any individual recording as such recordings are inadmissible hearsay as to him, and so should not be able to elicit summary statistics about calls, the content of which he could not independently introduce; (2) Hirst is seeking to prove his good character by introducing specific instances of good conduct, which is prohibited by Fed. R. Evid. 405(a); and (3) the length of the monitoring of Galanis's phone and the number of calls recorded during that monitoring is irrelevant to the issues at trial, or otherwise excludable under Fed. R. Evid. 403.

The recorded conversations during the period that Galanis's phone was consensually recorded are axiomatic examples of inadmissible hearsay. Those recorded calls are out-of-court statements that Hirst would seek to introduce to show the truth of the content of those recordings, namely, that such recordings did not contain "incriminating evidence." (Br. 1); Fed. R. Evid. 801(c) & 802.[1] Hirst purports to offer various non-hearsay rationales as to why he could introduce the content of the recordings, but these arguments are unpersuasive. First, it is not all clear, and Hirst offers no rationale why, recordings that in no way mention Shahini "provide

[1] Of course, the Government can introduce the recordings of Galanis and Hirst, as such recordings are statements of a party-opponent and are not considered hearsay pursuant to Fed. R. Evid. 801(d)(2)(A).

context" for Hirst's statements about the "Shahini thing" in the call the Government does seek to admit. It is certainly not the case that every call between Galanis and Hirst is admissible on the basis of providing "context" for the one call the Government seeks to admit, and the burden is on Hirst to demonstrate how any particular call provides context for the recording the Government seeks to admit.

Second, Hirst avers that he can introduce every statement between him and Galanis to show the absence of any statements about Shahini because the "absence" of a statement is a non-hearsay purpose. (Br. 2). This argument fails for many reasons. First, seeking admission of a statement to show the absence of certain content from the statement is fundamentally a truth-based purpose designed to show something about the content of the statement. Second, this non-hearsay exception would effectively swallow the hearsay rule, rendering essentially every statement that was ever uttered admissible to show the non-inclusion of certain content in the statement. Under Hirst's reading of the law, criminal defendants would be allowed to offer every non-incriminating recording obtained during a wiretap or period of consensual recording to show the absence of incriminating conversation during these recordings. The Government is aware of no case that sweeps so broadly and, indeed, the cases cited by Hirst do not stand for the proposition that he cites. *Fathera* v. *Smyrna Police Dep't*, 646 F. App'x 395 (6th Cir 2016) held that the absence of a specific *document*, where one might otherwise be expected to exist, was not a hearsay assertion. The same was true in *Columbia Commc'ns Corp.* v *EchoStar Satellite Corp.*, 2 F. App'x 360, 370 (4th Cir. 2001) and *Hendon* v. *Calderon*, No. 08 Civ. 139, 2009 WL 1424388, at *3 (E.D. Cal. May 20, 2009), in which the respective courts held that the wholesale absence of certain statements (complaints in the former case, grievances in the latter) were not hearsay assertions. The notion that the absence of any statements at all is a non-hearsay assertion is qualitatively very different from the claim being asserted by Hirst, which is that the absence of certain content within a statement that is in fact made renders the entire statement admissible to show the absence of the particular content. This latter principle is not supported by the case law cited by Hirst.

Because the recordings are hearsay as to Hirst and Hirst could not independently offer the recordings between himself and Galanis, he should be precluded from eliciting summary information about these recordings, including the length of time in which Galanis was making recordings, the number of overall calls recorded and the number of calls recorded between Hirst and Galanis.

In any event, Hirst is seeking admission of information about the calls for an improper purpose. To the extent that Hirst intends to argues that the number of calls not being introduced by the Government is somehow suggestive that non-criminal conduct occurred during those calls, that is an impermissible effort to use specific instances of good conduct (i.e., calls where no criminal conduct purportedly occurred) to prove good character. Specific instances of conduct, however, may not be used to prove good character. *See* Fed. R. Evid. 405(a); *United States* v. *Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (holding that the defendant "improperly attempted to establish defendant's good character by reference to specific good acts" when, in a trial for receipt of money in connection with the defendant's duties as a meat inspector, the defendant introduced evidence of instances when the defendant had not taken bribes); *United States* v. *Fazio*, No. 11 Cr. 873 (KBF), 2012 WL 1203943, at *5 (Apr. 11, 2012)

("As many courts have made clear, a defendant may not affirmatively try to prove his innocence by reference to specific instances of good conduct; character is to be proven by reputation or opinion evidence."). Hirst cannot introduce the recordings in an effort to prove instances of his good character and he should be precluded from eliciting summary statistics from which he can draw the same impermissible inferences.

Finally, Hirst should be precluded from offering summary statistics about Galanis's recording activity because the extent of Galanis's recordings is not probative of Hirst's criminal intent and is thus irrelevant under Fed. R. Evid. 401. Further, summary information about Galanis's recordings should be precluded under Fed. R. Evid. 403. The limited probative value of the fact that Galanis made recordings other than the one the Government intends to offer at trial is substantially outweighed by the potential for misleading the jury, confusing the issues, unfairly prejudicing the Government's case and turning the upcoming trial into a mini-trial about the nature, scope, extent and value of Galanis's recording activity.

If the Court disagrees and does allow Hirst to elicit evidence regarding summary statistics of Galanis's recording activity, the Government should then be allowed to elicit the fact that although Galanis was aware that his phone conversations were being recorded, he nonetheless has acknowledged that he committed the very crimes with which Hirst is charged during the very time period that his phone was being monitored. Because acknowledgement of Galanis's guilty plea and criminal culpability would be necessary to rebut the inference that Hirst is attempting to argue – that the length, frequency and nature of the conversations on Galanis's phone suggest that no criminal conduct was afoot – Hirst's eliciting of summary statistics would either unfairly prejudice the Government's ability to respond to inferences Hirst is drawing from these statistics (if the Government is not allowed to elicit evidence about Galanis's acknowledgement of guilt) or insert highly charged issues into the trial (if the Government is allowed to elicit evidence about Galanis's acknowledgment of guilt). In either circumstance, Fed. R. Evid. 403 allows the Court to preclude Hirst from introducing the evidence that would necessitate the resolution of this difficult issue.

Respectfully submitted,

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